



POLICE DEPARTMENT

November 12, 2010

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Stephen Gallagher
Tax Registry No. 897516
90 Precinct
Disciplinary Case No. 84875/09

The above-named member of the Department appeared before me on August 24, and September 1, 2010, charged with the following:

1. Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, on or about and between August 16, 2007 and August 30, 2007, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Lieutenant failed to make proper entries in the 90th Precinct's Command Log accounting for two (2) firearms belonging to a Member of the Service, which were being safeguarded in the 90th Precinct Property Room. *(As Amended)*

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT – GENERAL REGULATIONS

2. Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, on or about and between August 16, 2007 and August 30, 2007, failed and neglected to perform said Lieutenant's duties as the 90th Precinct's Desk Officer, to wit: said Lieutenant, upon commencement of his tour of duty, failed to inspect the property locker and all areas within the Command where invoiced property was being held.

P.G. 202-14, Page 1, Paragraph 8 – DESK OFFICER DUTIES AND
RESPONSIBILITIES

3. Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, on August 30, 2007, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Lieutenant failed to indicate in the Command Log that he was Present for Duty and assigned as the Desk Officer, as required.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT – GENERAL REGULATIONS

COURTESY • PROFESSIONALISM • RESPECT

4 Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, on August 30, 2007, upon becoming aware that two (2) firearms belonging to a Member of the Service were missing, failed and neglected to notify his Commanding Officer, Duty Captain and/or Internal Affairs Bureau, Command Center, as required *(As Amended)*

P G 207-19, Page 1, Paragraphs 2 & 3 – THEFT FROM DEPARTMENT
LOCKERS COMPLAINTS

5 Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, on August 30, 2007, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Lieutenant, upon becoming aware that two (2) firearms belonging to a Member of the Service were missing, failed to conduct a proper investigation into the missing property *(As Amended)*

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT – GENERAL REGULATIONS

6 Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, while-off duty, on May 15, 2008, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Lieutenant failed to carry his shield while armed

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT – GENERAL REGULATIONS

7 Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, on or about and between May 15, 2008 and May 26, 2008, failed and neglected to properly safeguard his firearm, to wit said Lieutenant placed his off-duty revolver underneath his mattress, wrapped in pajamas

P G 204-08, Page 2, Paragraph 7 – FIREARM GENERAL REGULATIONS
UNIFORM AND EQUIPMENT

8 Said Lieutenant Stephen Gallagher, assigned to the 90th Precinct, on or about July 22, 2007, upon becoming aware that a firearm belonging to a Member of the Service was missing, failed and neglected to notify his Commanding Officer, Duty Captain and/or the Internal Affairs Bureau, Command Center, as required *(As Amended)*

P G 207-19, Page 1, Paragraphs 2 & 3 – THEFT FROM DEPARTMENT
LOCKERS COMPLAINTS

P G 219-21, Page 1, Paragraph 5 – LOST /STOLEN FIREARM, SHIELD,
IDENTIFICATION CARD DEPARTMENT
PROPERTY

The Department was represented by Pamela J Naples, Esq , Department Advocate's Office, and the Respondent was represented by James M Moschella, Esq

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review

DECISION

The Respondent is found Not Guilty of Specification Nos 2, 4, 6, and 7 The Respondent is found Guilty of Specification Nos 1, 3, 5 and 8

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Michael Cafero and Police Officer Emilio Alvarado as witnesses

Sergeant Michael Cafero

Cafero is assigned to the 123 Precinct Detective Squad where he has been since October 2009 Prior to that, for approximately six years, he was in the Internal Affairs Bureau (IAB) Group 31

On August 30, 2007, Captain Leonis Pena, the Executive Officer of the 90 Precinct, notified the IAB Command Center that two guns belonging to Police Officer Kareem Thompson were missing Cafero responded to that precinct along with another member of his unit He inspected the property locker from which the guns were taken

and took photographs. He also notified the Crime Scene Unit and gathered paperwork such as the roll calls. In addition, he confiscated the command log.

Cafero noted that in the 90 Precinct there is a locked door to a room which contains a green locker "and in that locker Thompson's guns were inside a gray tire chain box." Cafero said that there was a piece of paper that was taped to the box that had Thompson's tax number. He identified a piece of paper that was taped to the gray box, which was received in evidence as Department's Exhibit (DX) 1¹. Cafero said he believed that there were two storage lockers in the room. He took a number of photographs which were entered in evidence as DX 2².

He did not recall if the room was locked and believed that a key to the room "should be" in the possession of the 90 Precinct desk officer. The green locker had a lock on it but he did not believe it was locked when he was there. Again, he believed the desk officer "should have" access to those locks.

Cafero explained that the Respondent became involved in the investigation because he was assigned as desk officer on August 30, 2007, "the time the guns were allegedly missing" and because he was the desk officer on several other occasions when the guns were not accounted for. He explained that on every tour the desk officer is supposed to make sure that all property is accounted for and recorded in the command log. This includes, he said, unlocking all the doors and looking to ensure that all property is there.

Explaining what a desk officer does, Cafero said that he should sign in as present for duty and go about his desk duties to check property, maintain the command log and

¹ The exhibit is actually a photocopy of the piece of paper.

² This two-page exhibit is made up of two pages of black and white photocopies of the aforementioned photographs. The quality of these "photographs" is quite poor.

make appropriate entries. Those entries include equipment entries and property entries. He agreed that entries are supposed to be made if property is missing. He said this is based on *Patrol Guide procedures*.

Cafero said that command log entries from August 16 through August 30 were examined because that is the period that Thompson stored his guns in the green locker until they were discovered to be missing. He testified that a review of command log entries for August 30 shows "that there was an entry made that the guns were unaccounted by [the Respondent]." The Respondent, Cafero testified, made this entry at 0852 hours. His recollection was that Thompson wrote that "there is no guns, there's no guns in the tire chain box."³

Based on his years in the Department and his knowledge of the *Patrol Guide*, Cafero opined that after the Respondent made the entry in the command log, he should have notified IAB or his commanding officer (CO). He should have done that, Cafero continued, because "there was missing firearms from a member of the Department."

When asked what else he discovered in the command log for that period, Cafero stated, "There's other numerous supervisors that didn't make required entries accounting for Police Officer Thompson's gun behind the -- in the property locker." He did indicate that on some occasions entries were made.

Cafero testified that he conducted two interviews with the Respondent and there may have been another. His conclusion after conducting the first interview was that the Respondent did not conduct an initial investigation as to Thompson's missing guns. Cafero opined that the Respondent was required to conduct such an investigation. This

³ This is either an error by Cafero in his testimony or by the court reporter in her transcription. The entry was made by the Respondent. The actual entry can be found in DX 6.

conclusion, Cafero stated, was based on Patrol Guide procedures which state, he said, that the Respondent should have conducted an additional investigation

During the course of his investigation Cafero also learned, he said, that on May 26, 2008, the Respondent "made an allegation" that he was missing his firearm from his Department locker Cafero said, "He was missing his Glock 19, his Glock 26 " Cafero was told by the Respondent that he had put the gun in his locker because he was going on vacation. He also put his shield in the locker He was, Cafero said, in possession of his off-duty revolver Cafero claimed that the Respondent said he "left with his revolver but he was unarmed -- he was armed without having his shield as well "

Cafero said that he believed the Respondent learned that his firearm was missing on May 26, 2008, when he returned to work Cafero learned during the course of questioning the Respondent that the Respondent secured his firearms in his house underneath his mattress wrapped up in his pajamas Cafero said that he knew that this was not a proper way to store firearms because of his experience and from the Patrol Guide To the best of Cafero's recollection, recruits are taught to secure firearms in a gun locker

Cafero also said that the Respondent secured his firearm with a gun lock and a trigger lock and then the gun is wrapped Cafero also said that there is a key and it is also attached to the bed frame

Cafero again indicated that wrapping the gun in pajamas was not a proper way to store a gun On questioning by the Court, Cafero noted that the gun was also secured with a trigger lock and a cable lock that was secured to the bed frame Cafero agreed that the gun was not merely wrapped in pajamas

Cafero re-asserted that this was not a proper way to secure a gun and said it should be in a gun locker. He was not able to provide the Court with a section of the Patrol Guide which required this, "off the top of his head."

Cafero testified that the Respondent has three children the ages of which he believed are 6, 8 and 12. During his investigation he also learned that sometime in July 2007, Sergeant Janice Gonzalez had misplaced her firearm. She called the Respondent to see if he had secured it for her. Cafero said that the Respondent spoke to Gonzalez and told her he would call her back. Cafero said what the Respondent should have done was notify his CO that a member of the service had reported her gun missing. He said there was no record at IAB about such a report.

On questioning by the Court, Cafero said that to his knowledge, a trigger lock goes through the gun and then through the trigger and there is a lock on it. Its purpose, he guessed, was to prevent someone from pulling the trigger. He added that there is a mechanism that goes through the trigger and prevents one from pulling the trigger. He asserted that a trigger lock does not prevent someone from stealing the gun.

At this point, several sections of the command log for August 16, August 26, August 28, and, August 30, 2007 were received in evidence, (DX 3, 4, 5 and 6, respectively). Regarding August 16, 2007, Cafero said that the Respondent signed in present for duty at 0645 hours as noted on page 253. He did the "command check" but did not make any entry regarding Thompson's firearms.

Cafero testified that, according to the command log, on August 26, 2007, the Respondent took the desk at 0255 hours as noted on page 348 and he performed the "checks" at 0745 hours. Again there was no indication that the box containing

Thompson's firearms was checked

Cafero testified that, according to the command log, the Respondent worked on August 28, 2007, and signed in present for duty at 0730 hours. He was assigned to the desk and performed his duties as desk officer by checking the property locker. Cafero said that the Respondent testified that on page 370 of the command log he noted that he did his "check" at 0931 hours. Cafero indicated that the Respondent did not indicate in the command log that he had "searched the box containing Police Officer Thompson's firearm."

Cafero testified that the Respondent worked on August 30, 2007, but the command log did not indicate that because he failed to sign in as present for duty. Cafero said he learned that the Respondent worked that day through the roll call and official Department interviews.

When asked if the Respondent "performed his duty as the desk officer by performing his property locker searches," Cafero answered, "Yes." He said the log indicated that the Respondent did this at 0720 hours. There was no indication that he searched the box "that contains Police Officer Thompson's firearms."

At 0852 hours, Cafero said, the Respondent made an entry which he read "Checked property locker area to find leg shackles, radar gun. Note at desk that Police Officer Thompson's tax 927592 secured firearms at stationhouse due to unknown conditions. No firearms in either gray box is normally used to secure Thompson's firearms."⁴

On cross-examination, Cafero agreed that LAB got involved in the investigation

⁴ The last sentence of that entry actually reads, "No firearm in either gray box normally utilized to secure firearms by appropriate MOS" (see DX 6)

on August 30, 2007, after it had been notified by the executive officer, Pena Pena, he believed, learned of the missing firearms from the integrity control officer, Lieutenant Robert Lynch Cafero said he believed that Lynch learned of the missing guns from the 4 to 12 desk officer, Sergeant Dawn Mundo, but he did not agree that the Respondent made the initial notification that started the investigation He agreed that the Respondent was interviewed but said that he had been called back to the precinct after he had gone home He insisted that any notification by the Respondent occurred after he had been ordered back to the precinct

Cafero said that Thompson arrived at the command at about 1500 hours and notified Mundo that the firearms were missing As far as Cafero knew, Thompson never told the Respondent that the firearms were missing He asserted that there was no notification made by the Respondent at 0800 hours

Cafero agreed that there is no indication that the Respondent was told while he was on duty, by anybody, that the firearms were missing Cafero asserted that one of the responsibilities of the desk officer is to inspect the property room of the precinct When asked what section of the Patrol or Administrative Guide that established that requirement, Cafero said that he could not quote the section but believed it is in the Patrol Guide He was then shown a copy of Patrol Guide section 202-14 and agreed that was the section he was referring to He said it required the desk officer to inspect the property locker where invoiced property is being held and then make entries in the command log Cafero agreed that Thompson's guns were not on a property clerk invoice nor were they listed on the precinct property index He agreed that he testified that it was the responsibility of the desk officer to go into the property locker and open all the doors

contained within "to inspect all property assigned to the command such as equipment that may be in there being secured, invoice property, anything that is assigned to the command that you are responsible for "

Cafero asserted that while every command is different, there is an updated list of vouchered property and the desk officer is responsible to compare that against actual property that is in the locker. Similarly, he agreed there is some sort of list of equipment that the desk officer is responsible to account for and that the officer checks equipment against that checklist. He agreed that Thompson's guns were not on a list.

Cafero asserted that between August 16 and August 30, 2007, while many desk officers did not make any notation about Thompson's guns, some did. He said he could not recall the specific number but he said, " it was a couple of times that they made reference that it was secured "

Examining the command log, Cafero agreed that the officer who followed the Respondent at the desk after he went end of tour did not check Thompson's guns as part of her review of property. Cafero agreed that a majority of desk officers failed to list Thompson's firearms. He also agreed that at Thompson's official Department interview Thompson said that he verbally told the desk officer which firearms he was removing and which he was returning and that no supervisor ever physically inspected which firearm he was removing or returning.

Cafero agreed that desk officers who were present when Thompson removed his firearms or brought them back and failed to note that fact received schedule A Command Discipline. None were given charges and specifications for failing to note that Thompson's firearms were present or not present in the command.

Cafero confirmed that Thompson said that on August 29, 2007, he (Thompson) went to the precinct and took one of his guns out. Cafero believed this was related to off-duty employment. The procedure Thompson was supposed to follow was to tell the desk officer what gun he was removing and then he could get the firearm himself. Cafero did not know if the desk officer made a notation regarding that transaction.

After reviewing his worksheet, number 9, Cafero agreed that Thompson told him that Wednesday, August 29, was his regular day off but he was present at the 90 Precinct regarding his off-duty employment. Thompson told him that at about 1630 hours he retrieved his Glock 19 and returned it to the stationhouse at about 2315 hours. He said that Sergeant Alexas was the desk officer on both occasions. After looking at the command log, he agreed that there were no entries regarding either of these events. He assumed that the gun was returned because Thompson told him and it was not otherwise confirmed. Cafero agreed that Thompson said he got the key and put his gun back into the locker and then he left. The next thing that Thompson said happened was that he reported for work at 1500 on August 30, 2007, and found there were no firearms in the gray metal box.

Cafero agreed that Thompson was assigned to the third platoon while the Respondent was assigned to the second platoon. Cafero agreed that there is no evidence that the Respondent was ever present when Thompson retrieved or returned his firearms. On questioning by the Court, Cafero indicated that he did not recall if Alexas recalled Thompson taking out or returning his weapon. He agreed there were no command log entries regarding either of these transactions.

On questioning by the Court, Cafero agreed that there would be a list of

vouchered property and a list of equipment for the desk officer to check against. He also stated that if something of value was also in the locker it would have to be accounted for. When asked if there was some other document that would cause the desk officer to check for property, Cafero indicated that the Respondent had said there was a note on the desk (on August 30, 2007) about Thompson's guns. He acknowledged that for the period from August 16 to August 29 he was not aware of the existence of any such note which would cause the desk officer to look for Thompson's guns. He asserted that even if there was no note on the desk the note on the gray box should have prompted an investigation.

On re-cross examination, Cafero asserted that based on his experience the note should have prompted an investigation.

With regard to Specification No. 8, Cafero agreed that Gonzalez remembered the incident of July 22, 2007, because it was a very busy day. She had worked a day tour and the Respondent was on the desk that day. She went behind the desk to perform some administrative functions. She said that when she goes out on patrol she secures her off-duty firearm in her locker in the supervisors' locker room. However, on this day, she did not follow her normal practice and procedure. Instead of placing the gun in her locker, she put it in her bag which was behind the desk. She did not inform the Respondent of this at the time.

After returning from patrol she said she went to the locker room to look for her off-duty firearm, having forgotten about having put it in the computer bag. She then remembered about the computer bag and went to the desk to look for it there but could not find it. She then called the Respondent to see if he had secured her off-duty firearm and he said he had not. She did not tell him that she had lost the firearm in that

conversation but did say that she was looking for it and did not know where it was

At a later point, the Respondent called her to ask if she had found her firearm but she said she had not. Subsequently, he found the firearm in his computer bag, called Gonzalez and left a message that he had found her firearm in his computer bag where she had put it by mistake. He then left the gun for her at the command. Cafero agreed that there is no indication that the gun was in the possession of anyone other than the Respondent. Cafero agreed that Gonzalez was not subject to charges.

On re-direct examination Cafero agreed that Alexas couldn't recall Thompson returning his firearm to the command. On review of his worksheet, however, he remembered that Alexas had written on a scrap of paper that he had seen Thompson's firearm but did not enter that information into the command log.

On questioning by the Court, Carfero indicated that the time from when Gonzalez could not find her gun until the Respondent found it was, he guessed, a couple of hours.

Police Officer Emilio Alvarado

Alvarado has been a member of the Department for 13 years and has been a firearms instructor assigned to the Firearms and Tactics Section for six years. He was qualified as an instructor in 2004. To become qualified he attended a four-week program which included two weeks of firearms training and two weeks of methods of instruction. He is certified by the Department to provide firearms instruction. He was also a firearms instructor in the United States Marine Corps and completed the FBI certification course in 2005.

As a firearms instructor Alvarado goes over the fundamentals of shooting,

operations and the care and maintenance of the weapons and equipment. He also teaches the use of deadly physical force, as well as the safeguarding and securing of firearms. He instructs officers of all ranks.

Alvarado explained that safeguarding a weapon includes protecting the weapon from theft or unauthorized use. Security, he said, means immobile containment in something that cannot be moved or stolen. In addition, he reviews devices used to protect firearms from unauthorized use, plus trigger locks or cable locks that are used specifically for firearms.

Alvarado explained that there is a difference between using a safety device and safeguarding a firearm. Safety devices, he said, render a weapon inoperable by preventing the mechanism from closing or not allowing the weapon to be loaded. Safeguarding it is a protection from theft.

He explained that a trigger guard prevents the weapon from being used by covering the trigger. A cable lock goes through the mechanism of the weapon itself, either to prevent the weapon from being loaded or to interrupt the operation in some way so that the firearm does not discharge. Alvarado testified that the safeguarding of a weapon is not their intended use, although he noted it has been done.

Alvarado explained that members of the service are required to receive training two times a year, which is double the general requirement of once a year. He also noted that the training included firearm safety and safeguarding a firearm. He explained the proper use of devices is covered in a PowerPoint presentation and he noted that theft of a firearm is stressed.

Alvarado said that placing a firearm under a mattress covered with a pajama is not

an acceptable method of safeguarding a firearm. With regard to a trigger lock and cable, he said that these mechanisms are not intended for safeguarding even if the cable is attached to a bedpost.

During training the written material referred to is the Patrol Guide, the Student Guide and the Recruit Training Manual. Alvarado then identified the Firearms and Tactics Section lesson plan for safeguarding firearms (DX 7) which he said is used to provide training on firearm safety and safeguarding procedures. It is, it says, designed to provide police officers instruction on securing the firearm and safeguarding at home. It is also provided to make officers aware of the firearm safety devices and how to apply them to their firearms.

Alvarado also identified the several pages of the Recruit Training Manual which he said were readily available in the lecture hall during the biannual firearms training (DX 8). He agreed that he touches upon the items written in the manual in his training. However, on questioning by the Court, he noted that it is not specifically covered but "they are shown visually and it is covered during the course of the lecture."

On cross-examination, Alvarado indicated that the Student Guide is handed out to recruits during training. He agreed that "this specific guide" is not handed out to veteran officers such as the Respondent. He agreed that any reference to the guide at biannual instruction is oral. Officers are told it is available in the lecture hall but they are not required to take a copy of it. They are advised, however, that they should take a copy of it.

Regarding whether officers are told that they must have a safe at home, Alvarado stated, "They are required to safeguard. How they do that, it's their personal choice."

When asked if officers are told that it is the Department's policy that they must have a safe or vault for their home, Alvarado stated that his answer was the same. When asked by the Court if they are told they must have a safe or firearm storage cabinet he answered, "No."

Alvarado stated that the instruction covers Department policy regarding the safeguarding of weapons and officers may deviate from it "to a degree." He agreed that the lesson plan (DX 7) lists what is recommended but not mandated. He agreed that the lesson provided that if one procedure was not utilized, the officer could use another. He insisted, however, that the lesson plan did not allow for deviation as to safeguarding. He agreed, however, that the Department was giving several options. He agreed that one of the options was a cabinet, storage box or container and that officers are allowed to deviate. He asserted that these are not instructions but recommendations.

He again agreed that one of the options is a storage box or container but when asked if officers were mandated to do that, Alvarado answered, "They are mandated to safeguard their weapon." When he was again asked if the box or storage container was mandated he said, "No." He disagreed that an officer could use another method of safeguarding the weapon so long as, in the officer's judgment, the weapon was safeguarded. When asked to explain this Alvarado stated, "They can deviate with using a device or other appropriate manner to safeguard their weapon."

He agreed that an officer could not properly leave a firearm in a sock drawer. He said the officer could use another device to secure the weapon if it was a device intended to safeguard a weapon. When asked what he was referring to he answered, "A vault or a safe or a Department locker. Other things that we described, devices that are intended to

safeguard the weapon ”

When asked if a vault and or Department locker are the only options available for an officer to store his firearm, Alvarado answered, “Those devices are intended to prevent the theft of the firearm ” When asked if the Department was requiring officers to get a vault or safe in their house, he responded, “They have the option of leaving it in the Department locker ”

Alvarado agreed that the only methods to safeguard a firearm are the Department locker, a vault or a safe He said that officers are not required to get a safe for their home However, when asked if an officer is allowed to keep a firearm under his bed, Alvarado responded, “Wherever he feels that weapon needs to be safeguarded Is it recommended? No ”

Alvarado agreed that the Student Guide (DX 8) advised members that the vast majority of burglaries committed in wealthy homes are done on a hit-and-run basis with no time spent searching the premises He further agreed that it advised officers to not simply leave the weapon where it would be easily found such as a dresser drawer He also agreed that members are taught not to make it easy for a thief to steal firearms He agreed that the document gives examples such a firearms storage cabinet but that these are solely recommendations

When asked if officers are instructed that it would be appropriate to safeguard firearms so long as it is not easy for a thief to steal them, Alvarado responded, “In a device intended to safeguard the firearm, yes ”

Alvarado agreed that he trained officers to unload their firearms and that placing a trigger lock over the trigger would render the firearm inoperable He testified that using a

cable lock to secure a firearm to a bedpost would not be in accordance with Department training because, he said, "its intended purpose is to prevent unauthorized use, to render the gun inoperable, not to secure it." He noted that the problem with cable locks is that the cables are fairly easy to cut. Alvarado agreed that there were no examples of a device to secure a firearm at home other than a safe or vault.

On questioning by the Court Alvarado agreed that there was no mandate to purchase a safe or vault.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent is the commander of the second platoon in the 90 Precinct. He has been a lieutenant for about five-and-a-half years and he has been with the Department for just short of 20 years. He was the subject of one disciplinary case about 14 years ago which was, he said, an EEO⁵ complaint that arose from him not taking disciplinary action against another member of the service. He pled guilty in that case.

The Respondent was working a 0645 by 1530 tour of duty on July 22, 2007, and he was the desk officer that day. Gonzalez was also working that day and she was, he said, one of the squad sergeants working under him. He had a black computer bag with him that day and Gonzalez had a similar bag.

When Gonzalez first came in, the Respondent said, she was behind the desk. They prepared the roll call together. At some point after roll call, she did some administrative function in the 124 Room and then she went out on patrol.

⁵ Equal Employment Opportunity

He did not have any conversation with Gonzalez about her off-duty firearm while he was on-duty and behind the desk. Later in the day, when he was driving to Orient Point with his family to pick up his son, Gonzalez called him. This, he said, was at about 1620 hours. *She wanted to know if he had secured her firearm. He told her he had not.* She did not seem upset and the Respondent noted that it was difficult to hear her because of a poor connection and the wind. He noted that "nothing seemed out of place." He said he did not think that anything was amiss. He did not believe at that time that she had lost her firearm or that it was missing.

The Respondent testified that an hour-and-a-half later she called again. At that time she said that she had not found the firearm and that she was looking for it. She noted that they had similar bags and asked if she could have put the gun in his bag by mistake. He told her that he did not have the bag with him. He noted that he was near Orient Point and the telephone service was very poor. The Respondent stated that he did not believe that Gonzalez had lost her firearm but had merely misplaced it.

The Respondent did not make any notification at that point because, he testified, he did not think anything was amiss. When he arrived home, at about 2100 hours, he checked his bag and found Gonzalez's off-duty 38 Smith & Wesson. He called her and left a message that the gun had been found. He said that the message he left was that he had found a "pocket of rocks and I'll give it back to you tomorrow. Did you find your rock collection?" Explaining why he used those words the Respondent stated, "Well, because I understood she was -- probably at this point, since she hadn't found it, that she was probably upset, concerned. I was trying to alleviate her fears that her gun was safeguarded at all times and I knew that she'd be worried."

The Respondent said that he did not make any notifications at that time because the firearm was never lost and was secured at all times. The next morning, he went to work at 0300 hours and had to go to a Critical Response detail at 0500 hours. So, after conferring with the Crime Analysis Sergeant, he left Gonzalez's firearm in the top drawer of the precinct desk. At about 0630 hours he called Gonzalez to let her know where the gun was.⁶

The Respondent testified that during the period from August 16 through August 30, 2007, he was the day tour platoon commander. In that position, he explained, he was responsible for the day-to-day operations of the command, including both patrol and desk officer. He explained that if there was one sergeant working he would work as the desk officer. If there were two, he would be patrol commander and he would spend his time in between being inside and outside the stationhouse. During the period from August 16 to August 30, he was the desk officer either for the majority of his tour or just for short periods. He believed that on three tours he was assigned as desk officer.

Reviewing the command log, the Respondent agreed that he was assigned as the desk officer on August 16, August 26 and August 30, 2007. He agreed that on other days in that period he worked the desk for limited periods of time, such as if he came in early, or to relieve the desk officer, or if they were short supervisors. He indicated that he covered the desk for part of the time on August 20 and August 28.

The Respondent indicated that the desk officer has the responsibility "for insuring that the voucher[ed] property and Department property is accounted for, verifying that property procedures are done in the stationhouse and to some extent out on

⁶ The Respondent's testimony commence on August 24, 2010. Testimony that day ended at this point. The Respondent resumed his testimony on September 1, 2010.

patrol, arrest processing, property, going to the medical examiner or going out of the borough. It's a multitude of things."

Explaining his duties as desk officer, the Respondent stated that normally he has a checklist that is a list of all of the property allegedly secured in the stationhouse. This would include vouchered property. He explained that he would direct a police officer to do the inventory and account for it on the checklist, or if he was not busy, he would do it himself. He explained that he usually works Monday through Friday and the property officer is on duty and that officer would generally do the inventory for him. The Respondent said that he would verify that the property is there and that he would conduct a spot check to make sure certain items are present.

The Respondent testified that the property they look for is on the property clerk's invoice. This, he said, is a five or six page snap out form that lists the property and explains if they are secured in security envelopes, if they are secured with a seal or if they have been brought to sanitation to be destroyed.

In addition to vouchered property, the Respondent explained, there is Department property. In his command there is a checklist of Department property and there is a box to check off that property and then transpose that information to the command log. He said that, depending on the command, there would be 25 to 60 items that have to be accounted for each tour. These include metal detectors, meters, defibrillators, "there's a multitude."

The Respondent then identified a document as the list of all the properties vouchered on August 30, 2007 (Respondent's Exhibit [RX] A). The list, he testified, had about 70 items of vouchered property. The Respondent testified that after the check

is done the result is entered in the command log

The Respondent also identified a document as a list of Department property used to check against property in the locker (RX B)

The Respondent testified that prior to August 2007, on a few occasions, a very few occasions, officers stored their firearms in the property locker. He said he could not recall four occurrences in his 14 years as a supervisor. He was never responsible for taking the firearms in or returning them. No voucher or property invoice was prepared. He was never present at the desk when members of the service wished to check or attempted to retrieve their firearms. The only time this happened was on August 30, 2007. This occurred when Thompson told him that he couldn't find his firearms.

He said he did not consider firearms left in the property room to be something he had to note in the command log because it is not invoiced property. He said that he does so now but only because of the charges against him in this case. He reasserted that in August 2007, he "absolutely" did not consider such an item something that had to be noted in the command log.

On August 16, 2007, the Respondent said that he did not know who Thompson was, although he had heard the name. He pointed out that Thompson did not work on his tour. He agreed that the command log indicated that he took the desk at 0715 hours. At 0800 hours he started to make entries regarding Department property and other required entries. The entries extended from pages 253 to 254, covering about 0800 hours to 0830 hours. He stated that he did conduct an inspection of the property locker that day and that he memorialized the result in the command log. He cannot say if Thompson's firearms were in the locker but if they were, he would not have mentioned them as "[t]here would

have been no requirement to " He added that he had no knowledge that they were supposed to be there

On August 16, the Respondent said he signed off the desk at about 1445 hours and Sergeant Mundo took over

The Respondent testified that on the other days he worked the desk, August 20, 26 and 28, he did not make any entries about Thompson's firearms He said he did not believe he was required to, adding that, "[t]here's nothing that I found that required me to make those entries, either as the Department's property nor vouchered property

Regarding August 30, 2007 the Respondent testified that his first entry was at roll call at 0710 He acknowledged that he did not sign in saying, "It's possible that I had done an extended tour, but I don't believe so I think I simply forgot to sign in " He agreed that he noted his presence in the command log at 0710 hours and that he made entries indicating that he had inspected various logs that he was required to make He also noted the Prisoner Roster and indicated that there were three prisoners in the cell

On that day, August 30, 2007, he made an entry regarding Thompson's weapons At 0852 hours he said he noted that he checked the property room in the locker area "to find leg shackles, radar gun, and radio number 108 were met with negative results, which basically just means they were not in the property room " He also said he noted that Thompson secured his firearm in the stationhouse "due to unknown conditions " He said he wrote that no firearms were in the gray box

The Respondent said that while doing his initial search of the property room he was not looking for Thompson's guns because he did not have any reason to believe they were there He said that while he was making his various entries at the desk he saw a

note on the left hand corner which had Thompson's name, tax number and serial number of the two guns. He identified the note depicted in DX 1 as being similar. The Respondent said that even with him finding the note he had no indication that the guns should have been there. He pointed out that it said that on occasion he had safeguarded his firearms. Once he found the note he went back to the property room and saw that the guns weren't there.

He explained that at that point he understood that Thompson did not keep the guns there all the time. He had never seen him put the guns in and he had no reason to believe they should have been there. He spoke to the telephone switchboard operator who knew Thompson and he learned that Thompson was on vacation and worked paid details and he believed that Thompson may have had the firearms for that purpose.

He said he checked the command log for the previous tour and saw no entry regarding these firearms. He did not believe that the firearms were missing at that point in time.

The Respondent said he learned that these firearms were missing when Thompson told the desk officer, Mundo, at 1500 hours on August 30, 2007. He left the precinct at his end of tour at 1530 hours and by that time the executive officer, Pena, had been notified that the guns were missing.

He did not notify the commanding officer because the executive officer already knew about the missing guns. He did not notify IAB because the executive officer and the desk officer were conducting an investigation and because the desk officer did not believe the guns were missing.

After he left the precinct, he received a phone call from his wife who said that the

integrity control officer, Lynch was looking for him and that he had to go back to the precinct, which he did

When he returned to the precinct, he was interviewed by Pena. He said that IAB interviewed him at a later date. The Respondent testified that it is his understanding that in November 2007, Thompson's firearms were found in the ceiling of the precinct by building maintenance.

Looking at the copies of photographs in DX 2, the Respondent indicated that they are of the green property locker and the gray boxes. He said this does not reflect how the boxes actually were positioned. He further said that the note would not have been visible if the boxes were placed the way they were usually positioned to fit in that area. He further said that the box with the number six on it was not in the property locker. He did not recall seeing the note (DX 1) taped to any box.

He said that he was not shown the pictures at his official Department interview. He said the piece of paper was not taped to the side of the box as depicted in the picture. He knows this because he is familiar with the box and it has a "crinkly" finish. Further, the Respondent asserted the 90 Precinct is notorious for not having tape. He testified that it would be very difficult to tape onto the crinkly part of the box.

The Respondent also noted that in the picture of the box with the note on it in DX 2 the note is "whitewashed" and "tough" to read. He again asserted that the picture does not show the position the boxes had in the storage cabinet.

With regard to Specification Nos. 6 and 7, the Respondent stated that he had three firearms, two Glock automatics and a Smith & Wesson revolver. He indicated that his service firearm was stolen from his locker in the supervisors' locker room in May 2008.

He explained that it was his practice to store his off-duty revolver with a combination trigger lock and a cable lock which also has a combination which "may have" been secured to another cable lock so that it could be secured to a bed frame, "making it immobile "

The Respondent explained that

In general, the revolver would be stored in a safe in my daughter's room. And my off-duty gun that I work with, my off-duty gun would be secured in a manner which prevented my children from getting to it, either with a cable lock or secured in one of my tool boxes in the basement, depending what I was doing for the day. If I was leaving the house and I wasn't taking my firearms, which generally I don't, it would have been secured in the same manner my revolver was, with a cable lock and a trigger lock.

The Respondent stated that in May 2008 he decided to store his off-duty automatic in the safe but for personal protection he chose to store the revolver under the bed. He stated that it is less likely to be stolen and easily secured with cable locks. He noted that he was not concerned about scratching the gun.

The Respondent indicated that he had been on vacation from May 15, 2008 to May 26, 2008. During that period, he kept his revolver underneath the bed. He explained that he secured it with a trigger lock that had a combination. A cable went through the cylinder. He said he may have had a second cable to give it more length but he did not remember. In either case, the cable was secured to the bed frame. He said the only way to get the cable off would be to cut it or disassemble the frame.

The Respondent presented a picture (RX C) which he said depicted how he stored the firearm under the bed with a cable and trigger lock. He said the picture differed in one way from how he actually stored the weapon in that he would wrap the weapon in his

pajamas so it would not be visible. The Respondent noted that he did not take a picture of the gun wrapped up because "there would be no point."

The Respondent said he was interviewed regarding the loss of his firearm from his locker on the day the loss was discovered. He said that he was interviewed as a "witness victim." He said he believed that the manner in which he stored his off-duty revolver satisfied the Patrol Guide requirements. He said that he has been to firearms training and he did not recall being told that he had to store a firearm in a locked box. He said it is suggested and that is why he uses a safe. Additionally, he said the City Council passed a law that required that a firearm be secured with a cable and that when he bought replacement parts for his firearm he was given a cable lock. He said, as a result, he believes that he is in compliance with the Department guidelines and the safety of his children.

Regarding Specification No. 6, which alleges that on May 15, 2008, he failed to carry his shield while armed, the Respondent said that was his last day at work before he went on vacation. He said that at his official Department interview, he had said that he believed he had brought his off-duty weapon home on that day. At his second interview he said he could not be absolutely certain. He stated that he knew that the firearm was home and that he may have brought it home on May 14, 2008. The Respondent testified that he "likely" did not bring his firearm home on the May 15. He acknowledged that on that day he had left his shield for safekeeping in his locker, which he thought was secure being in a Department facility.

Recapping, the Respondent stated that on May 15, 2008 he left for a one-week vacation. He left his service Glock and shield in his Department locker. He agreed that

it is possible that he transported his off-duty service revolver home that day without his shield but he could not say for certain as it was three years ago

On cross-examination, the Respondent agreed that on July 22, 2007, Gonzalez contacted him after he had left the command and asked if he had secured her firearm. He said she did not tell him it was missing but she had misplaced it. He agreed that an hour or so later, she spoke to him again and he learned that she still had not found the firearm. He agreed that he had said the firearm was safeguarded at all times. He agreed that at the time he spoke to Gonzalez he was out on the eastern end of Long Island and that he did not know where the firearm was. He agreed that a few hours passed before he went home and found the gun, and neither Gonzalez nor he knew where the gun was during that time period. He noted that during the second conversation she suggested that the gun might be in his bag.

The Respondent agreed that in August 2007, his primary assignment was as platoon commander of the day tour. He explained that he is either the desk officer or patrol supervisor but he is always the platoon commander. He noted that generally a sergeant takes the position of patrol supervisor. He agreed that he was assigned to the desk on August 15, 26, and 30, 2007. He said he was assigned to the desk for part of the tour on August 28. He agreed that he stated that it was his practice to look one tour back in the command log to see what property may or may not be in the command log. Looking at the command log (DX 3 page 251) he agreed that there was an entry regarding Thompson's firearms at about 0140 hours.⁷ He said he signed in at 0645 hours and that he conducted his property checks at 0800 hours. He agreed that he did not make

⁷ The entry reads 0140 Firearms Secured PO Thompson, Tax 927592 secured 2 firearms behind the 90 desk, Glock 19 DTT764 US, Glock 26 EEM208 US

an entry regarding Thompson's firearms

The Respondent agreed that people have at times secured firearms in the property locker. He is familiar with the box that is generally used for that purpose, which is placed in one of the property storage lockers. He agreed that as desk officer he had the key to the property room and a key to the lockers that are next to the property room. He agreed that he stated at his official Department interview that he was responsible for property in the stationhouse. He indicated that what he meant was vouchered property and Department property. He agreed that he also stated that he was not aware of the firearms being safeguarded until August 30, 2007.

The Respondent stated that he saw the two boxes on the morning of August 30, 2007 and did not see any firearms inside.

He stated that the reason he would indicate that something is not present is if it is on the list and not in the locker. The Respondent stated that he did a second check of the property room as a result of finding the note on the desk. He agreed that the firearms were not reported in his first property check.

The Respondent explained that when firearms are safeguarded at the command they are usually placed in one of the two gray plastic tire chain boxes which are in a separate area of the command locker. He said that is in one of the large green double-door cabinets. He has a key to that cabinet in which, he said, a lot of Department property is secured.

When asked if he made notifications at 0852 hours when he noticed the note and saw that the guns were not in the box the Respondent stated, "No, why would I make notifications?" The Respondent agreed that he went about his normal daily business for

the rest of the tour and signed out at 1535 hours. He agreed that he had said that at some point while he was still in the command Thompson said he could not find his guns. The Respondent said that he spoke to Thompson at about 1500 hours. He did not conduct an investigation but spoke to Mundo, whom Thompson had already notified. He said that, she, Mundo, had made the notifications.

When asked when Mundo made the notifications, the Respondent said, "A few days after she was informed by Police Officer Thompson."⁸ He said he was standing in front of the desk and she was behind the desk when she was on the telephone with the captain.

Regarding the May 2008 incident when his firearms went missing, the Respondent agreed that he was not sure if he had his off-duty firearms with him when he left for vacation. He acknowledged that at his official Department interview he had answered, "Yes" when asked whether he had his off-duty gun with him when he left work on May 15. He agreed that he had said he left his shield in his locker.

During that vacation he stayed in the local area. During that time his automatic, he said, was secured in the safe while his revolver was secured under the bed with the cable lock. The Respondent acknowledged that he has three children at home.

On re-direct examination the Respondent again explained that Mundo was the desk officer when Thompson reported that his firearms were missing and that Mundo made the notifications contemporaneous with Thompson's report. He reasserted that he was present when Mundo made the notifications. He explained that the executive officer, Pena was involved in the investigation at that time and that the investigation was ongoing when he signed out and left the precinct.

⁸ This is apparently either an error by the court reporter or the Respondent misspoke because as other testimony makes clear, the notification was made that day.

The Respondent agreed that he did not make any notifications at 0852 hours that morning and explained that he had no reason to do so. He had no reason, he said, to suspect that the guns were missing.

He explained that there was a note on the desk that said that Thompson secured his firearms at the stationhouse. That does not mean that he secures them there all the time, he is free to take them when he wants. The Respondent said that he spoke to the telephone switchboard operator who informed him that Thompson was doing paid details and was on vacation, both of which meant that he might have had his firearms with him.

The Respondent noted that to avoid the problem in the future, the manner in which such firearms are stored in the 90 Precinct has been changed.

FINDINGS AND ANALYSIS

The Respondent is charged with eight specifications. These specifications result from three separate incidents involving firearms.

Specification Nos. 1 through 5 arise out of the loss of two firearms belonging to Police Officer Thompson from the precinct property locker. These firearms were recovered some months later by building maintenance hidden in the ceiling of a room in the precinct.

Specification Nos. 6 and 7 arise out of an investigation into the theft of the Respondent's firearm from his Department locker. The Respondent is not charged with the loss of his firearm. The charges result from statements he made during his official Department interview when he was questioned as a witness in regard to that loss.

Specification No. 8 results from an incident in which another officer misplaced

her firearm in the Respondent's computer bag

The first two specifications relate to the Respondent's responsibilities as desk officer and therefore can be considered together. Specification No 1 charges that the Respondent, on or about and between August 16, 2007 and August 30, 2007, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he failed to make proper entries in the 90 Precinct's command log accounting for two firearms belonging to Thompson, which were being safeguarded in the 90 Precinct Property Room. Specification No 2 covers the same period of time and alleges that the Respondent failed and neglected to perform his duties as the 90 Precinct's desk officer in that upon commencement of his tour of duty, he failed to inspect the property locker and all areas within the command where invoiced property was being held.

The evidence indicates that on August 16, 2007, Thompson started to keep his firearms in the Department property locker. Thompson did not testify and there is no indication in the record why his two firearms were stored in the Department property locker. Apparently Thompson was able to take his firearms in or out of the precinct at will and thus it is significant that there is no testimony or other evidence to indicate exactly when or how often he did this.

Thompson worked a different tour than the Respondent. The Respondent said that he knew Thompson's name but did not otherwise know him. Apparently, they first met on the afternoon of August 30, 2007, when Thompson discovered that his firearms were missing.

During the period in which Thompson stored his firearms at the precinct property locker, the Respondent worked as desk officer either for a full or partial tour on several

occasions. These appear to be August 16, August 26, August 28, and August 30, 2007. It is unquestioned that on each day the Respondent listed and accounted for vouchered and Department property in the command log as required. He indicated that he did the check of property by comparing the vouchered property to a list of vouchered property which is exactly what is provided for in Patrol Guide section 202-12. He also said that he used a checklist of Department property to determine if all Department property was present. This procedure is not in the Patrol Guide as such but certainly makes sense given the large number of items of Department property that must be accounted for.

The Respondent has claimed that because the Patrol Guide does not specifically require him to list the firearms left in the property locker, he is not required to list these items. The Court disagrees. It has repeatedly been held that the Patrol Guide is just that, a guide. A clear example of that is noted above. The Patrol Guide list of procedures for desk officers does not mandate the inventory and listing of Department property. The best evidence that this responsibility exists even though it is not expressly in the Patrol Guide came from the Respondent, who testified that doing so was a part of his required duties as desk officer.

If the Respondent saw the firearms in the property locker or saw a notation or other writing alerting him to the fact that firearms were secured in the property locker, which is basically under the control of the desk officer, then he, as the desk officer, needed to note this in some fashion. Again, the best example is provided by the Respondent himself, who, upon seeing a note on the desk regarding the firearms on August 30, 2007, promptly took action by looking for the firearms and making a note of his search and negative results in the command log.

The question now becomes what the Respondent knew on each of the days he was the desk officer

On August 16, 2007 at 0140 hours, during the tour that preceded the Respondent's arrival at the precinct, there is an entry in the command log. It is written in clear block lettering and states that Thompson's firearms were secured "behind the 90 desk." The Respondent reported for work that day at 0715 hours and was assigned as desk officer. During his testimony the Respondent volunteered that one of the things he did upon assuming the desk was to review entries from the previous tour. Had he done so, he would have had to have seen the "FIREARMS SECURED" entry. There was no other entry about the firearms for the rest of that tour and up until the Respondent began his entries in the command log as desk officer. This situation created an obligation to account for those firearms just as the note he found on the desk on August 30, 2007, created an obligation to take some action.

The failure to follow-up on the firearms on August 16, 2007, and the failure to make appropriate entries in the command log about the firearms that were apparently then in the custody of the desk officer, constitutes a failure to make proper entries into the command log on that day and the Respondent is found Guilty of Specification No. 1 based on that.

As to the other days, no similar prior entry was put into evidence. Indeed the Department conceded that most of the desk officers during that period of time made no entries about Thompson's firearms. The guns may not have been present on the other days in which the Respondent was on the desk. The guns were not vouchered property or Department property and there is no evidence that the firearms were on either of those

lists alerting the Respondent to account for them. The finding of guilt is therefore limited to his omission on August 16, 2007.

As to the claim in Specification No. 2 that the Respondent failed to inspect the property locker, this is based purely on circumstantial evidence. The thinking behind this specification apparently is that if the Respondent failed to note the presence of Thompson's firearms in the command log, it is because he did not look in the property locker, because if he had, he would have seen the firearms and noted them. This so-called proof is so slim it provides nothing more than speculation.

To begin with, the entries the Respondent made in the command log regarding vouchered and Department property constitutes circumstantial evidence that he did in fact inspect the property locker and other places where vouchered property is kept. Without reliable evidence that the firearms were actually physically in the locker on each of the days, the presumption that Respondent examined the property locker outweighs the speculation that he did not.

With regard to August 16, 2007, the entry in the command log states that the firearms were "behind the 90 desk." That could have meant the property locker or it could have meant any number of other places or drawers "behind the desk."

If he had read the entry, the Respondent should have searched for the firearms. But he may not have read it, and based on the entry the firearms might not have been in the property locker. He may well have looked in the property locker and not found the firearms because they were not there but somewhere else behind the desk. So it is not possible to conclude, even to a mere preponderance of the evidence, that the Respondent did not inspect the property locker or other areas where invoiced property was held on

that day

As to the other days on which the Respondent served as desk officer, the evidence is even weaker. As already noted, there is no prior command log notation in evidence to indicate that the firearms were in the property locker when the Respondent assumed the responsibilities of desk officer. There is thus a lack of substantial evidence to indicate that the Respondent failed to inspect the property locker or other areas where invoiced property was held on any of days on which he was on the desk. The Respondent is found Not Guilty of Specification No. 2.

Specification No. 3 charges that on August 30, 2007, the Respondent engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he failed to indicate in the command log that he was present for duty and assigned as the desk officer, as required. The Respondent has admitted this and while it is readily apparent that he was on the desk and working as desk officer, apparently starting at 0710 hours, he failed to note that he was present for duty. The Respondent is found Guilty of Specification No. 3.

Specification Nos. 4 and 5 deal with alleged misconduct by the Respondent on August 30, 2007. Specification No. 4 alleges that on August 30, 2007, he engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that "upon becoming aware that two (2) firearms belonging to a Member of the Service were missing, [he] failed and neglected to notify his Commanding Officer, Duty Captain and/or Internal Affairs Bureau, Command Center, as required." Specification No. 5

alleges that at the same time he also engaged in conduct prejudicial in that he "failed to conduct a proper investigation into the missing property "

The evidence regarding this specification is that on the morning of August 30, 2007, while serving as desk officer, the Respondent found a note on the desk which had Thompson's name and tax number. It also listed two firearms and their serial numbers. That is all the information contained on the note.

At 0852 hours the Respondent made an entry in the command log indicating that he had looked in the property locker. He could not find some leg shackles, a radar gun and a radio. He also noted "PO Thompson 927592 secured firearms at SH due to unknown condition ". He then went on to indicate that neither of the two firearms listed were in the box usually used on occasions when firearm were stored at the stationhouse.

The Respondent said that he learned from the telephone switchboard operator that Thompson was on vacation and worked paid details. The Respondent said that he believed that Thompson may have taken the guns out.

The question is whether that was an appropriate response to the situation. The Respondent claimed that he first learned of Thompson's arrangement with the guns when he found the note. He did not know Thompson personally and had no information about why the firearms were there. The fact that he was on vacation does not really explain why Thompson would sign the firearms out of the precinct and indeed it could be argued that while he was on vacation the guns should have been stored at the precinct.

The paid detail might explain the absence of one gun but not necessarily two guns. In short, the limited investigation the Respondent conducted did not reasonably explain the absence of the firearms. There was certainly no reason at that point to

assume the firearms were missing but he should have gone further by attempting to reach out to Thompson and, failing that, he should have notified others in the command to see if they knew what the situation was

It is thus apparent that the Respondent failed to conduct a proper, that is, a more thorough, investigation after he looked for Thompson's firearms in the locker at about 0800 hours. It is also apparent that, had the Respondent conducted a proper investigation, he would have discovered, at that time, that Thompson's firearms were missing. The Respondent is found Guilty of Specification No. 5.

As to Specification No. 4, the charge is that the Respondent, "upon becoming aware that two (2) firearms belonging to a Member of the Service were missing," he failed to make notifications. The fact is that he did not become aware that the firearms were missing, as charged. The reason for this was that he did not do a thorough investigation. The guilty finding in Specification No. 5 addresses the Respondent's misconduct. Because the Department did not establish what it alleged in Specification No. 4, he is found Not Guilty of that specification.

Specification No. 6 alleges that the Respondent, while-off duty, on May 15, 2008, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he failed to carry his shield while armed.

The only evidence to support this allegation comes from a statement the Respondent allegedly made during an official Department interview.

On May 15, 2008, the Respondent went on vacation. When he returned, on May 26, 2008, he discovered that his service weapon, which he had secured in his Department

locker, had been stolen. During the investigation of this theft he was interviewed as a witness (and indeed a victim). During his statement he mentioned that before going on vacation he had secured his service weapon and his shield in the aforesaid Department locker. Based on a claim that he also said that he went home with his off-duty revolver, this charge was lodged.⁹

No tape or transcript of the interview underlying this charge was placed in evidence. The only evidence we have of what was actually said comes in the form of a question asked by the Assistant Department Advocate (Advocate) to the Respondent on cross-examination during this trial. The Advocate, referring to a transcript of the official Department interview, asked

Advocate I'll refer you to page 20, line 18 through 20. Do you recall

Question When you left on the 15th, you went home with your service weapon, your off duty weapon?

Answer Yes

Advocate Do you recall being asked that question?

Respondent I do

Advocate And your shield was in the locker that day?

Respondent That's correct

There are several problems with this as evidence sufficient to establish the charge. The first of these problems is that a prior statement is not itself evidence of its truth, it is simply evidence of a possible prior inconsistent statement to challenge the truth of the trial testimony. The testimony of the Respondent at this trial was that he may have taken his off-duty revolver home on the 15th but he was not sure and in fact may have taken it home the previous day. This testimony is at best equivocal and, as will be seen, the prior statement does not establish that this trial testimony is false or that the Respondent took

⁹ There is no testimony or other evidence to indicate whether the shield was stolen as well.

his off-duty revolver home on the 15th

As there is no tape or transcript of the interview we must assume that the quoted material reflects the only question asked on this subject. In this instance the Department has brought charges against a member of the service being questioned as a witness, based on one answer to one question on a subject incidental to the main topic of the interview. There was no follow-up to ensure that the question was understood. There certainly were none of the warnings that go with being the subject of an interview. This is not to excuse false statements made by a witness, but fair notice must be given of the import of the question and the answer. Indeed this Court has seen official Department interviews where the interviewee went from being a witness to being a subject and was notified as such. While that may not be necessary in all cases, certainly the potential significance of the question and the clarity of the answer need be established before a charge is lodged.

No better example of this can be seen than in the question and answer in this case. The question asked at this Respondent's interview in pertinent part was, "you went home with your service weapon, your off-duty weapon." The question thus incorporated both weapons. However, we know from the other that the Respondent's service weapon was left in the locker. If the question was asked carelessly then the answer was equally ill thought out. This is not surprising as the issue in this specification, whether he went home armed and without his shield, was not at all the issue at the time. A clearer question and/or follow-up was required.

More significant is the fact that the question, which incorrectly includes both weapons, is not inconsistent with the Respondent's trial testimony nor does it establish a basis for proving the charge. As a result, the Respondent is found Not Guilty of

Specification No 6

Specification No 7 claims that the Respondent, while-off duty, on [or about and between] May 15, 2008 and May 26, 2008, failed and neglected to properly safeguard his firearm, in that the Respondent "placed his off-duty revolver underneath his mattress, wrapped in pajamas " This is a very troubling specification because it is, as drafted, completely misleading

The only evidence to support this allegation apparently comes from the same official Department interview that was the genesis of the previous specification As with the previous specification, the only evidence comes from statements made by the Respondent What is misleading about the specification, as written, is that it leaves out the fact that before wrapping the revolver in pajamas and hiding it under his mattress, the Respondent unloaded it and secured it with a trigger lock He also slid the cylinder sideways and put a cable through that part of the gun and looped it around the side rail of the bed frame Both the trigger lock and cable were secured with combination locks

Whatever one may think about the trigger lock and cable, the fact is that the Respondent did not simply wrap the gun in pajamas and hide it under the mattress as alleged, he took steps to insure that the gun was not misused or stolen Because the specification fails to mention these actions, it is misleading and that alone should be a basis for dismissal of the charge However, because substantial evidence was had on the subject of failure to safeguard, this Court will examine the substantive issues raised

There is no Patrol Guide section which explains exactly what is meant by securing a weapon As a result, the Department called a firearms instructor from the

Firearms and Tactics Section There is no question that Alvarado is an expert in the area of firearms, but his testimony about what is required was, in the end, evasive

The first part of Alvarado's testimony was clear He testified that there are two components of gun security The first is to render the gun inoperable The second is to prevent theft of the firearm He was also clear in his testimony that the trigger lock and gun cable are designed to meet the first aspect of gun security and not the second

The lack of clarity comes in when he discussed what steps the Department requires to prevent a gun from being stolen The questioning and his answers on this subject went around and around but appears to sum up as follows The Department recommends but does not require the use of a safe or gun storage locker A member of the service is free to secure a firearm as he or she sees fit But, on the other hand, nothing else will satisfy the Department's requirement regarding how a weapon is to be safeguarded

What this translates to is that the Department will only recognize a gun storage locker or a safe as appropriate methods of storing a firearm at home but such storage is not mandated Ironically, Alvarado stated he would recognize the use of a Department locker for gun storage as an appropriate method of safeguarding yet it was the theft of the Respondent's service from his locker that initiated the investigation which led to the instant specification It is worth noting that nothing untoward happened with the revolver that is the subject of this specification

Alvarado relied on two Department documents, the Student Guide and the Recruit Training Manual (DX 7 and 8) While Alvarado's explanation that there are two aspects related to securing a firearm there is nothing in either of the documents he submitted that

makes that statement The Recruit Training Manual (DX 7) proclaims that the lesson will "instruct officers on securing firearms at home and correctly apply a firearms safety device " It also states that the lesson will "explain three (3) recommended firearms safety devices that are available to safeguard their weapon " After stating that the firearm should be unloaded and describing safe methods for unloading the weapon, the lesson goes on to describe three safety devices, with pictures The first is the trigger lock, the second is the cable lock and the third is the gun storage cabinet or safe

At the end of the lesson, (on the last page of DX 7), there are three questions to "summarize" what was learned Question B is "What are the (3) recommended firearms safety devices that are available to safeguard their weapon?" The answer is obviously the three items listed above There is absolutely nothing in this lesson that provides or even suggests that these methods must be used in conjunction with one another and indeed a reasonable person would conclude that these are alternative methods of safeguarding a weapon

The Recruit Training Manual (DX 8) provides essentially the same information as the Student Guide but it does contain some of the information Alvarado testified about For instance on the page entitled Firearm Safety Devices (p 24¹⁰), which has pictures of two types of cable locks and a trigger lock, the text states that "safety devices are not designed to prevent theft " On another page, under the caption, "Preventing Theft" (p 28), the manual provides

Short of installing a vault, there is no foolproof method of safeguarding the weapon at home from a burglar Extra precautions should be taken to conceal the weapon in an obscure place and LOCK IT SECURELY IN AN IMMOBILE CONTAINER This may preclude discovery and/or removal of the firearm In addition, care must be taken to

¹⁰ This exhibit goes from a page numbered 21 to a page numbered 29

always safeguard firearms in the previously recommended manner (cartridges removed and a locking device affixed to the weapon)

The question is whether this is mandatory or merely suggested. There are several factors which indicate that it is the latter. The first is that Alvarado testified that this guide is "available" to officers during semi-annual training and not distributed for mandatory review and compliance. Nor is there anything in the text of this document that states that this is a mandatory procedure for safeguarding. On the contrary, the language of the document indicates that there is discretion to the officer to choose a method of firearm safety at home.

Specifically under the heading Chapter II – Firearms Safety (p. 22) the document explains that the Department *recommends* (emphasis added) that pistols or revolvers be secured by removing the weapon from the belt and while still in the holster be directly placed in a strong box with a key or combination lock. It then recommends that the "strong box" be stored in an area inaccessible to children or other unauthorized persons.

The Recruit Training Manual then provides that "if not stored as described above, the pistol should be secured as follows." It then goes on to describe how the weapon is to be safely unloaded and then it suggests that the weapon should be placed "in a location that is inaccessible to children or other unauthorized persons."¹¹

If there are alternate methods of storage then there is no single, mandated method of storage at home, something Alvarado ultimately conceded in his testimony. The issue then becomes whether the Respondent "safeguarded" his firearm.

In this case the Respondent unloaded his weapon. He then employed two

¹¹ Additionally, reading this document and considering Alvarado's testimony, it is not clear if the Department is recommending unloading and cabling or trigger locking a weapon that is stored in a "strong box" safe or firearm storage cabinet.

methods to insure that the gun was inoperable by using a trigger lock and a gun cable. He also secured the weapon to the bed frame using the cable. While Alvarado noted that this is not the designed use of the gun cable, the cable appears to be quite substantial as does the bed frame. Moreover the Respondent concealed the firearm in pajamas and hid it in an obscure place.

While this method might not have made the gun impervious to theft, the Recruit Training Manual itself recognizes that "short of installing a vault, there is no foolproof method of safeguarding the weapon at home from a burglar." Certainly the cabling and concealment reduced the likelihood of discovery and theft of this firearm.

Under all the circumstances it is clear that the Respondent made a reasonable effort to safeguard the revolver in question from both misuse and theft. The Respondent is found Not Guilty of Specification No. 7.

Specification No. 8 charges that on or about July 22, 2007, the Respondent, "upon becoming aware that a firearm belonging to a Member of the Service was missing, failed and neglected to notify his Commanding Officer, Duty Captain and/or the Internal Affairs Bureau, Command Center, as required."

Although it does not mention the name of the member of the service involved this specification, it apparently refers to an incident in which Gonzalez misplaced her off-duty firearm in the Respondent's computer bag.

The first problem with the specification is that it references Patrol Guide section 207-19, entitled Thefts from Department Lockers. The declared purpose of this section is "to investigate reported thefts from Department lockers" and its procedures go into effect

"upon discovery of a theft or attempted theft from a Department locker "

There is no testimony that there was any evidence of a theft of a locker in reference to Gonzalez's gun. On the contrary, she apparently pretty quickly remembered that she had put the gun in her computer bag and Cafero testified that she had said that realization came to her before she called the Respondent.

A second section of the Patrol Guide, Procedure No. 219-21 is also referenced in this specification. This section appears to come closer to the situation at hand in that it is entitled Lost/Stolen, Firearm, Shield, Identification Card. This section mandates that a member of the service who discovers the loss or theft of any one of the enumerated items must notify the desk officer, precinct of occurrence, immediately, (emphasis as in original).

While the section does not apply only to the member of service who is the owner of the enumerated property, certainly the rule would apply to the owner. It is therefore interesting to note that the evidence in this trial indicates that no disciplinary action was taken with regard to Gonzalez.

Of course the Respondent was also obligated under this section to report the missing firearm. The question is how to apply the section to the circumstances. As has been noted the Patrol Guide is a guide, thus common sense and good judgment must also be considered.

The Respondent was off-duty and on his way out to the eastern end of Long Island when he received the first call from Gonzalez. In that call she asked if the Respondent had taken some action to safeguard her firearm. He said he had not. Clearly this phone call occurred just after she realized she could not find her gun. She was still in

the process of looking for it and there was apparently no reason to believe that it would not soon be found as often happens with misplaced property. Moreover, the Respondent was not on duty and not at the precinct. Bearing in mind that she too had an obligation to report the firearm missing, it seems to be within the realm of a reasonable judgment for the Respondent not to report the firearm missing at that point in time.

When Gonzalez called an hour or so later it was a different matter. Gonzalez made the second call to tell the Respondent that she thought she might have inadvertently put her gun in the Respondent's computer bag, which was similar to hers. At that point in time the Respondent knew that the gun was still missing. He also knew that, because he was far away in eastern Long Island, it would be several hours more before he could get home to his computer bag to see if she was right. Although Gonzalez had a reasonable, and in fact correct, hypothesis as to where the firearm was, neither he nor she had any way of knowing if she was correct until he got home. The time already passed, combined with the time that would be needed before he could confirm her theory, was substantial enough to mandate a report of a lost or stolen firearm as required by Procedure 219-21. The Respondent is therefore found Guilty of Specification No. 8.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on October 15, 1990. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of four of the original eight specifications. The Department had recommended a penalty involving the loss of 35 vacation days and dismissal probation. That penalty seems excessive even if the Respondent had been found guilty of all of the original specifications and an analysis of what he did and did not do is in order to attempt to craft an appropriate penalty.

The Respondent has been found Guilty to Specification No. 1 only with regard to a failure to follow-up on the entry made during the previous tour about Thompson's firearms. The firearms were, according to Cafero, recorded as present after that date by at least some of the other desk officers so they did not go missing at that time or as a result of that omission by the Respondent.

On August 30, 2007, the Respondent searched for the weapons near the start of his tour, which provides some indication that they probably were missing prior to his arriving for work that day.¹² There is thus no evidence or reason to believe that the Respondent was in any way responsible for the loss of Thompson's firearms. His act of omission on August 16, 2007, is worthy of punishment but it is not a matter of sufficient significance to justify the penalty recommended.

The next act for which the Respondent has been found guilty involves the failure to note in the command log that he was present for duty. Properly signing in as present for duty is something he did on every other occasion and this appears to be an uncharacteristic and minor omission. It is very clear in the command log that he was

¹² The Assistant Department Advocate claimed, in her closing argument, that there was hearsay testimony from Cafero, indicating that desk officers said the firearms were in the property locker at the close of their tours. This Court could find no such testimony, particularly as it might relate to the tour prior to the Respondent's on August 30, 2007. In any event, such testimony would be hearsay and not subject to critical analysis on cross-examination. These are, after all, Department employees and presumably could easily have been produced for this trial. This is particularly critical as such statements would be self-serving since Cafero's interviews would have occurred after the weapons were known to have been missing.

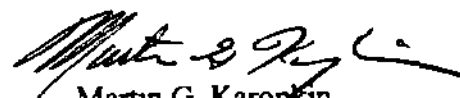
present for duty that day and was performing his job as desk officer

His next failure involves the fact that he did not conduct a proper investigation of missing, or at least potentially missing, property at some time around 0800 hours on August 30, 2007. Although he did make some inquiry, it was not sufficient under the circumstances and led to a delay of several hours (until Thompson came to work at 1500 hours that afternoon) before the loss was confirmed and reported.

Lastly the Respondent has been found Guilty of failing to make a notification regarding Gonzalez's misplaced firearm. Certainly the primary duty to repost the loss rested with Gonzalez, who created the problem. The fact that she was not punished does not lessen the Respondent's failure but it is something to consider.

Considering all of these factors this Court recommends a penalty of the loss of 20 vacation days.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner – Trials

APPROVED
JUN 09 2011

RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From Deputy Commissioner – Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
LIEUTENANT STEPHEN GALLAGHER
TAX REGISTRY NO 897516
DISCIPLINARY CASE NO 84875/09

In 2009, the Respondent received an overall rating of 3.0 “Competent” on his annual performance evaluation. He was rated 3.5 “Highly Competent/Competent” in 2007 and 2008. He has been awarded one medal for Excellent Police Duty and two medals for Meritorious Police Duty. [REDACTED]

The Respondent has been the subject of one prior disciplinary adjudication. In 2000, he forfeited 15 vacation days for failing to report employment discrimination.

For your consideration


Martin G. Karopkin
Deputy Commissioner – Trials